Supreme Court of the United States

OCTOBER TERM, 1923.

No. 135

NAMPA & MERIDIAN IRRIGATION DISTRICT,
Appellant,

vs.

J. B. BOND, Project Manager of Boise Project of the United States Reclamation Service,
Defendant,

PAYETTE-BOISE WATER USERS' ASSOCIATION, Ltd.

Brief of Appellant

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64

INDEX

STATUTES

CASES

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Appellant,

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Brief of Appellant

STATEMENT OF CASE

This cause was originally brought in the District Court of the Southern Division of Idaho, and is now on appeal to this court from the decision of the Circuit Court of Appeals for the Ninth Circuit.

Appellant is an Idaho public corporation of the class designated as Irrigation Districts. It has purchased from the United States, water rights delivered from the Boise Project for 40,000 acres of land within its boundaries. This purchase is evidenced by the principal and supplementary contracts at-

tached to the complaint as Exhibits "A" and "B." (Tr. p. 5-17.) It is obligated to pay the United States approximately $3,000,000 as the cost price of these rights, together with a pro rata share of the annual maintenance and operation charges of Boise Project, to be officially determined by the Secretary of the Interior.

The District also furnishes an older class of water rights appropriated from Boise River for use on 25,000 acres of land. Contract "A" classifies these lands as "project" and "old water right" lands. The remainder of Boise Project, amounting to approximately 100,000 acres of land, lies outside and adjoining the boundaries of the District. These lands which constitute what is left of Boise Project after the elimination of the lands included in the District, are represented by intervenors, Payette-Boise Water Users' Association, Ltd.

This Court is asked to construe that part of the contract marked Exhibit "A" relating to payment of a pro rata share of the annual maintenance and operation charges of Boise Project. It is found in the last sentence in Section 12 of the contract, beginning at the bottom of page 11 of the transcript and is as follows:

> "The project lands in the District shall pay the same operation and maintenance charge per acre as announced by the Secretary of the Interior for similar lands of the Boise Project and the same shall be collected by the District for

the United States and paid over by the District to the United States, and upon notice from an officer of the United States in charge of the Boise Project the District will withhold the delivery of water from such Project lands in the District as are in default in the payment of said operation and maintenance charge."

The authority of the Secretary of the Interior to make said contracts is found in Section 5 of the Act approved August 13, 1914 (38 Stat. 686), commonly known as the Reclamation Extension Act, which reads as follows:

"Sec. 5. That in addition to the construction charge, every water right applicant, entryman, or landowner under or upon a reclamation project shall also pay, whenever water service is available for the irrigation of his land, an operation and maintenance of the project or each separate unit thereof, and such charge shall be made for each acre-foot of water delivered; but each acre of irrigable land, whether irrigated or not, shall be charged with a minimum operation and maintenance charge based upon the charge for delivery of not less than one acre-foot of water; Provided, that whenever any legally organized water users' association or irrigation district shall so request, the Secretary of the Interior is hereby authorized, in his discretion, to transfer to such water users' association or irrigation district, the care, operation, and maintenance of all or any part of the project works, subject to such rules and regulations as he may prescribe."

It is our belief that upon the execution of the contract this appellant became the accepted representative of what is termed in this statute as a "separate unit" of Boise Project.

Appellant is a public corporation under the laws of Idaho with jurisdiction to acquire, construct, operate and maintain irrigation works. It has jurisdiction to levy taxes for "construction" and for "operation and maintenance" of such works as declared in such statutes. As is universally true of public utilities, all expenditures are classified under these headings.

In order, however, to fully appreciate the statutory distinction made in said Section 5 between "the construction charge" and "an operation and maintenance charge," it is necessary to consider said section in connection with Section 4 of the same act, which reads as follows:

> "Sec. 4. That no increase in the construction charges shall hereafter be made, after the same have been fixed by public notice, except by agreement between the Secretary of the Interior and a majority of the water-right applicants and entrymen to be affected by such increase, whereupon all water-right applicants and entrymen in the area proposed to be affected by the increased charge shall become subject thereto. Such increased charge shall be added to the construction charge and payment thereof distributed over the remaining unpaid installments of construction charges."

It should be observed, also, that by the terms of contract "A" the construction charge for water rights for approximately 40,000 acres of land was liquidated conditionally at a maximum of $75.00 per acre and later when the construction charge of the project had been fixed by the Secretary by public notice as provided in said Section 4 of the Federal Statutes, this was reduced to $70.00 per acre by contract "B."

Hence the cost of the proposed drainage system, which is the subject matter of this litigation, must be governed, as a matter of law, by said Section 4, if it be held that the same is a construction and not an operation charge under this statute and the manner of its collection cannot be a matter of "judgment and discretion" on the part of the Secretary. In other words, the improper collection of the construction charge under the guise and pretense of "operation and maintenance" would deprive appellant of the benefit of the express terms of its contract.

Under the terms of Section 4, the settler is guaranteed that the Secretary shall not impose additional construction without the consent of a majority of the landowners affected. Even then he cannot be charged with construction which does not benefit his land. The Secretary is required to limit the charge to part of the lands if all are not benefited.

Long after this District became the representative of a "unit" of Boise Project, and some time prior to February 15, 1921, the officials of the Reclamation

Service made surveys and investigations of a proposed drainage system to relieve certain waterlogged lands represented by the Water Users' Association, lying entirely outside of the appellant District.

On said date, the Secretary issued a special public notice, purporting to levy an annual charge of a flat rate of $1.00 per acre per annum for an indefinite period of time on account of said proposed drainage construction.

The material part of said notice is as follows:

> "(a) A regular operation and maintenance charge to be hereafter announced in the usual manner to cover all costs of operation and maintenance other than drainage.
>
> "(b) A special operation and maintenance charge for drainage purposes of One Dollar ($1.00) per irrigable acre per year until further notice, to become due and payable Fifty (50c) per irrigable acre on April 1, 1921, and Fifty (50c) per irrigable acre on October 1, 1921, and Fifty (50c) cents per irrigable acre on March 1st and October 1st of each year thereafter until further notice, the money received from such special operation and maintenance charge to be used after the same has been paid in to the United States in providing drainage on the Boise Project to minimize or prevent as far as possible the swamping and waterlogging of the lower lying lands of the project by seepage from the irrigation of the higher lands and by seepage from the irrigation

system of the project, to lessen the damage which would otherwise result from the operation of said canal system and to maintain the irrigability of the lands of the project, said drainage charge to be considered a part of the minimum operation and maintenance charge per irrigable acre, the remainder of said minimum charge per acre and all charges per acre-foot of water used in excess of the amounts of water allowed for such minimum charge to be hereafter announced and determined by Public Notices to be hereafter issued from time to time.

"JOHN BARTON PAYNE,
"Secretary of the Interior."

This does not purport to be an annual levy "based upon the total cost of operation and maintenance of the Project, or each separate unit thereof for the current year or any particular period of time, nor is it as is required by the statute, made for each acre-foot of water delivered" or upon "a minimum operation and maintenance charge based upon the charge for delivery of not less than one acre-foot of water" as provided by Section 5 of the Reclamation Statute, but it is an arbitrary demand for the semi-annual payment of a flat sum on certain dates and on the same dates "of each year thereafter until further notice." This charge is patently an attempt on the part of the Secretary to require the landowners to contribute to an indefinite fund for use some time in the future as he might determine. It will be observed that subsection (a) states that while the

record does not show the usual form of announcing the *regular* charge, yet as a matter of fact, that charge is fixed annually as expressly required by the statute on the basis of the water actually used by each landowner. While this *special* charge does not purport to be for a fiscal year but is to continue indefinitely.

Demand was made upon the District for payment of this charge and was refused. The Reclamation Service then threatened to refuse delivery of water under the contract unless payment was made. Whereupon the present action was brought to determine whether the District was liable under its contract for the cost of the proposed drainage. Complainant included in the Bill of Complaint such allegations as were deemed necessary by the Reclamation Service in order to present the facts as fully as possible. The suit is for ~~special~~ specific performance by the Government of the contract to deliver water to the District. This form of action was acceptable to the defendant.

It should be observed in Section 10 of the Complaint the plaintiff specifically alleges that the purpose of this charge is the construction of a drainage system which will not benefit the lands within the District and that said drainage system is to be constructed to prevent said lands from being ruined by seepage and alkali "as a result of irrigation from the said irrigation system of the Boise Project."

Since the case was disposed of on the Complaint and Motion to Dismiss the decision must stand or fall upon the facts as alleged in the Bill of Complaint. Appellant contends that the decision actually rendered by the Circuit Court of Appeals is based upon a state of facts not in the record, to-wit: That the Secretary constructed the drainage works "to conserve and protect the property under his charge."

The District Court sustained a motion to dismiss the Bill of Complaint. The case was appealed to the Circuit Court of Appeals, which affirmed the judgment of dismissal, and the District appeals to this Court.

See Nampa & Meridian Irrigation District v. Bond, et al., Book 283F, page 569.

And same case, Book 288F, page 541.

SPECIFICATIONS OF ERRORS

Appellant relies on the errors assigned on appeal to the Circuit Court of Appeals, which are repeated here and additional errors in decision of that Court, as follows:

First. The Court erred in making the order filed on August 22, 1922, for the dismissal of the Bill of Complaint.

Second. The Court erred in making and entering the decree in said action on the 25th day of October, 1922.

Third. The Court erred in holding as a part of the said order mentioned in the first specifi-

cation, that the cost of the proposed drainage works, referred to therein, constituted a part of the annual maintenance or operation charges of the Boise Project under the terms of Sec. 5 of the Act of Congress, approved August 13, 1914 (38 Stat. 686), commonly known as the Reclamation Extension Act, or at all.

Fourth. That the Court erred in holding as a part of said mentioned order, that the cost of the proposed drainage works, referred to therein, did not constitute an increase of the construction charges of Boise Project under the terms of Sec. 4 of the said Act of Congress, commonly known as the Reclamation Extension Act, or at all, and was not governed by the provisions of said section.

Fifth. That the Court erred in holding as part of said mentioned order that the Hon. Secretary of the Interior could announce or determine the amount of said drainage charge, or any part of the operation or maintenance charge of Boise Project, as a flat rate per acre.

Sixth. That the Court erred in holding that Subsection (b) of Exhibit "C" attached to the Bill of Complaint constitutes a sufficient determination or announcement of an annual operation or maintenance charge for the Boise Project under the terms of Section 5 of said Reclamation Extension Act.

Appellant further specifies errors of law found in the opinion and decision of the Circuit Court of Appeals, to-wit:

Seventh. In failing to require the defendant to file its answer and establish its claim by competent testimony pursuant to the following statement in the opinion:

> "While indefinite, the term operating expense is a broad and comprehensive one, and its meaning in a given case depends on the nature and amount of the expenditure, and all the surrounding circumstances. As said by the Court in (f. 130) Schmidt v. Louisville C. & L. Ry. Co., 84 S. W. 314, 318: 'There is no rule of law declaring what constitutes operation expenses. That is to be determined by the testimony as to each item of expenditure. It is a matter of evidence, and determinable like any other fact.'" (Page 57, Transcript.)

Eighth. In reciting in said opinion, the following statement of facts not found in the record, to-wit:

> "The situation confronting the Reclamation Service was this: The necessity for drainage follows irrigation on an extensive scale almost as a matter of course. It cannot be determined in advance with any degree of certainty when drainage will be required, or its cost or extent when required. If not provided for in advance, as was the case here, it can only be provided for by agreement with a majority of the landowners affected, or by a maintenance and operation charge." (Page 57 of Transcript.)

In holding that the drainage charge under consideration was incurred by the Secretary "to conserve

and protect the property under his charge" as stated in said opinion.

Ninth. In holding as a matter of law:

> "It has been almost universally held that damages to person or property resulting from operation is a proper operating expense, and had injury resulted to crops or other property from the operation of this system, compensation for such injury would fall within the most restricted meaning of that term." (Transcript, Page 58.)

Tenth. In holding that the determination of the Secretary of the Interior to the effect that the construction of a new drainage system is a proper operation charge is controlling upon the Courts, and refusing to determine whether said determination is in accord with law and the contract under consideration.

ARGUMENT

I.

JUDGMENT AND DISCRETION OF SECRETARY OF THE INTERIOR IN ADMINISTERING RECLAMATION ACT.

The decision of the Circuit Court of Appeals now under consideration concludes as follows:

> "In other words, the expense of preventing injury by seepage resulting from operation, is a proper operation charge, or, at least, *the determination of the Secretary of the Interior to that effect is controlling upon the courts.*

The jurisdiction of the Secretary in relation to the public lands is distinctly different from the ordinary jurisdiction of the heads of executive departments of the government and is even different from the jurisdiction he may exercise as a mere executive in charge of reclamation projects. His jurisdiction relative to public lands has been stated as follows:

In U. S. ex rel Riverside Oil Company v. Hitchcock, 190 U. S. 324, the Court said:

> "Congress has constituted the land department, under the supervision and control of the Secretary of the Interior *a special tribunal* with *judicial functions* to which is confided the execution of the laws which regulate the purchase, selling and care and disposition of the public lands. * * * Neither an injunction or mandamus will lie against an officer of the land department to control him in discharging an official duty which requires the exercise of his judgment and discretion." (Italics are ours.)

But even in dealing with the public lands, the Secretary is not above the law. In case of United States v. George, 288 U. S. 14, the Court said:

> "Acting under the authority presumed to be given by Sec. 2246 and other sections, a regulation was promulgated which prescribed forms of taking pre-emption and final homestead proof by questions and answers, and provided that 'the claimant will be required to testify as a witness, in his own behalf, in the same manner.' It was testimony exacted in pursuance of this regula-

tion and in the manner directed by it which constitutes the charge of the indictment. It will be observed, therefore, that the claimant was required to testify as other witnesses. In other words, three witnesses were required; Sec. 2291 requires two only, and, as we have said, points out what proof, in addition, the claimant himself shall give. It is manifest that the regulation adds a requirement which that section does not, and which is not justified by Sec. 2246. To so construe the latter section is to make it confer unbounded legislative powers. What, indeed, is its limitation? If the Secretary of the Interior may add by regulation one condition, may he not add another? If he may require a witness or witnesses in addition to what Sec. 2291 requires, why not other conditions and the disposition of the public lands thus be taken from the legislative branch of the government and given to the adequate answer to say that the regulation must be reasonable. The power to make it is expressed in general terms. If given to the discretion of the Land Department? It is not an adequate answer to say that the regulation must be reasonable. The power to make it is expressed in general terms. If given at all, it is as broad as its subject, and may vary with the occupant of the office. This is to make conditions of title, not to regulate those constituted by the statute.

"In United States v. United Verde Copper Co., supra, this Court considered the power of the Secretary of the Interior under an Act of Congress giving the right to cut timber from the public lands for certain purposes which

were enumerated, 'or domestic purposes,' and making the right subject to such rules and regulations as the Secretary of the Interior might prescribe 'for the protection of the timber and of the undergrowth growing on such lands, and *for other purposes.*' (Italics are ours.) The Secretary made a regulation which provided, among other things, that no timber should be 'permitted to be used for smelting purposes, smelting being a separate and distinct industry from that of mining.' The justification urged for the regulation was that the word 'domestic' meant household. This court rejected the contention, and decided that the regulation transcended the power of the Secretary. We said: 'If rule 7 (the regulation involved) is valid, the Secretary of the Interior has power to abridge or enlarge the statute at will. If he can define one term he can another. If he can abridge, he can enlarge. Such power is not regulation; it is legislation.'

"In that case the power of the Secretary of the Interior was directly associated with the right conferred. Yet it was held that such power could not qualify or limit the right. In other words, a distinction between the legislative and administrative function was recognized and enforced. And, similarly, this distinction must be recognized and enforced in the case at bar. The distinction is fundamental."

This Court has repeatedly reviewed the official action of the Postmaster General when classifying periodicals under the postal laws and has held that

the decision of the Postmaster General will be treated as conclusive "unless palpable error appears." In case of Central Trust Company v. Central Trust Company of Illinois, 216 U. S. 261, the Court said:

> "We have had occasion to consider the effect of findings of fact by officers in charge of the several departments of the Government and the accepted rule is that these findings are conclusive *unless palpable error appears.*"

In Leach v. Carlile, 258 U. S. 138, this Court said:

> "The conclusion of the Postmaster General, under which a fraud order was issued, pursuant to U. S. Rev. Stat., Secs. 3929, 4041, that the substance which the person against whom the order was issued was so far from being the panacea of which he was advertising it through the mail to be that, by so advertising it he was perpetrating a fraud on the public will not be reviewed by the Courts where it is fairly arrived, and has substantial evidence to support it, *so that it cannot be justly said to be palpably wrong and therefore arbitrary.* (Italics are ours.)

In Smith v. Hitchcock, 226 U. S. 58, in dealing with a similar determination, the Court said:

> "Thus a question of law is raised, although as suggested in Bates & G. Co. v. Payne, we should not interfere with the decision of the Postmaster General unless *clearly of the opinion it was wrong.*" (Italics are ours.)

But the jurisdiction of the Secretary in using public funds for construction "before the cost of the project has been fixed by public notice," is a very different matter from his jurisdiction after the cost has been fixed. Section 4 of the Reclamation Extension Act positively forbids any increase in the construction charge without consent of a majority of such landowners. The construction of the proposed drainage works is a major act of construction which increases the cost of water rights whether designated by the Secretary as a *construction* or as *operation* expense. Unless the Secretary can impose a construction expense running into millions of dollars by simply "determining" that it is an operation charge, then the express provisions of law found in said Section 4 must be respected.

The material part of said Section 4 reads as follows:

> "Sec. 4. That no increase in the construction charges shall hereafter be made, after the same have been fixed by public notice, except by agreement between the Secretary of the Interior and a majority of the water right applicants and entrymen to be affected by such increase, whereupon all water-right applicants and entrymen in the area proposed to be affected by the increased charge shall become subject thereto. Such increased charge shall be added to the construction charge and payment thereof distributed over the remaining unpaid installments of construction charges."

When the Secretary executed the contract "A" he was not contracting with reference to public lands of the United States. These lands were all privately owned. Because he had no jurisdiction over these lands, he made this contract in order that appellant as a public corporation, might require unwilling landowners to accept water from the project. The official statement on the subject, appearing at pages 48 and 49 of the Record, is in part as follows:

> "Notes — The term 'project land' as used herein refers to lands under the constructed unit of the project and having no water right from private canals, as distinguished from old water right lands having a partial water supply from private canals." (p. 48.)
>
> "Explanatory Statement:
>
> "Unless irrigation districts or some form of organization capable of binding all the lands should be formed, it will be necessary to depend upon individual applications or contracts, the making of which is largely optional with the individual landowners. Without district organizations binding all lands, it is estimated that a considerable percentage of the landowners will avoid paying the government for a water right by picking up waste water, or securing water in some other way or holding the land for speculation without irrigation. Consequently it is estimated that a charge of approximately $70 per acre will be necessary if districts are organized and contracts made, binding all irrigable project lands to pay for a water right, and a charge

> of $80 per acre without such organization. That is, it is estimated that a payment of $70 per acre from all project lands guaranteed by an irrigation district having the taxing (fol. 112) power enabling it to assess all the lands would bring in a total revenue or payment equal to the amount which would be collected by a charge of $80 per acre upon such of the project lands as the owners thereof may elect to purchase water rights for." (p. 49.)

It should be observed that the supplementary contract marked "B" (pages 13 to 17, Tr.) liquidates the construction charge for lands within this District at $70 per acre in accordance with the official statement from which we quote.

Under the irrigation district law of Idaho these contracts were authorized by a two-thirds vote of the electors of the District, and it may be presumed that they relied upon the positive declaration of the Secretary fixing the construction charge at the stated price per acre when they voted the authority. The situation then is as follows:

Contract "A" makes the lands in this District a "unit" of the Boise Project as that term is used in Section 5 of the Reclamation Extension Act. Before the cost of the Project was fixed by public notice, the Secretary, acting within his jurisdiction, determined that certain irrigation canals and reservoirs and certain drainage systems should constitute the Boise Project. He determined that these were necessary

and located them at such points as his judgment and discretion dictated. Every dollar so expended for drainage works of precisely the same character as that now under consideration was included as part of the construction charge of Boise Project. The drainage systems so constructed are set out in detail on page 47 of the Record and total the sum of $776,-754.44, of which $235,228.99 were charged to the Project lands and were included as a part of the construction costs announced by the Secretary.

In the very contract under consideration, provision is made for a drainage system of the precise character and use as that which the Secretary proposes to construct and charge as an *operation charge* of the Project, and the expense is classed in the above mentioned publications as a construction charge.

But said drainage system was planned as a part of a general plan for the whole Project. Contract "A" contains the recital:

> "NOW THEREFORE, It is hereby agreed:
>
> "1. That as a part of the general drainage system of its Boise Project, the United States will construct for the Nampa & Meridian Irrigation District, a drainage system to a total cost of Five Hundred Fifty-seven Thousand Dollars ($557,000.00)." (See bottom of page 6, Tr.)
>
> "It is fully understood that the United States is to expend only Five Hundred Fifty-seven Thousand Dollars ($557,000.00), including cost of preliminary work in drainage construction for the District, under this contract, and to stop

> when such limit of expenditure has been reached. It is not expected that the lands of the District can be completely drained at this cost nor a drainage system extended to each farm unit, but that only a number of principal drains will be constructed with which individual and community farm drains can be connected." (Page 7, Tr.)

Hence, the said drainage system, being constructed before the cost of water rights was fixed by public notice and also being part of a general plan, was equitably and properly charged as part of the construction cost of the whole project.

The drainage system now under consideration is neither for the whole Project nor can it be included in the construction charge, since that has already been fixed. Section 4 flatly requires that the consent of a majority of the landowners to be affected shall be secured or else the construction charge shall not be increased. If, in fact, the cost of a drainage system is a construction charge and not an operation and maintenance charge, then the designation of such a charge as an "operation charge" coupled with a threat that if the appellant does not pay the same, the Secretary will refuse to deliver the water rights which have been purchased at the rate of $70 per acre in full payment therefor, is a clear threat with actual power to carry it out, that he will destroy the vested rights of landowners in 40,000 acres of land unless they submit to an illegal demand from which no possible benefit can accrue to them.

We therefore insist that this is not a case involving the exercise of judgment and discretion by the Secretary, but that it involves the refusal on his part either to respect the plain provisions of Sections 4 and 5 of said statute and the plain provision of our contract as set forth in the Statement of the Case.

II.

IS THE COST OF THE PROPOSED DRAINAGE CONSTRUCTION A CONSTRUCTION CHARGE?

Section 5 of the Reclamation Extension Act reads:

> Sec. 5. *That in addition to the construction charge*, every water right applicant, entryman or land owner under or upon a reclamation project shall also pay, whenever water service is available for the irrigation of his land, an operation and maintenance charge based upon the total cost of operation and maintenance of the project, *or each separate unit thereof*, and such charge shall be made for each acre foot of water delivered." (Italics are ours.)

It is clear that the operation and maintenance charge here provided is *in addition to the construction charge*. Hence it is clear that project expenses can be legally classified in two classes, neither of which includes the other. These terms are found both in the reclamation act and in the contract. Furthermore, this classification is universally used in all statutes relating to Public Utilities Commissions,

whether Federal or State, and in the volumes of reports issued by such commissions. Also in all laws relating to drainage or irrigation districts. They are in universal use, and always with the same general significance.

Under "Maintenance" the Standard Dictionary gives:

> "Maintenance of way (Railroad) the keeping in repair of tracks, bridges, etc."

In "Words and Phrases," under head of "maintain" we find:

> "The word 'maintain' has been defined as meaning to support that which has already been brought into existence. Kendrick and Robers vs. Warren Bros. Company, 72 Atl. 461, 464;"
>
> " 'Maintain' is defined to mean, to hold or to keep in a particular state or condition, especially in a state of efficiency; to support, sustain, not to suffer to decline.' Kovachoff vs. St. Johns Lumber Company (Ore.) 121 Pac. 801, 803."
>
> "The word 'maintain' is practically the same then as 'repair,' which means to restore to a sound or good state, after decay, injury, dilapidation or practical destruction, and when used in reference to railroad right of way, includes the idea of keeping the right of way in such a condition that it can be used for the purpose for which it was intended." Missouri K. & T. Company of Texas vs. Bryan, 107 S. W. 572, 576, (citing Verdin vs. City of St. Louis (Mo.) 27 S. W. 477.)

Under head of "Construction" in the same work, we find:

> "The term 'construction' with reference to a building, means the putting together of the material used therein. Scharff vs. Southern Illinois Const. Co., 92 S. W. 126, 130, 115 Mo. App. 157."
>
> "Although the term 'establishment' of a drainage ditch means the action of the Board of Supervisors in ordering it, and 'construction' means the actual work, these terms are so interchangeable that, in the absence of evidence showing greater damage at one point than another, they may be used as synonymous in instructions in a proceeding to assess damages for the taking of land for a drainage ditch. Larson vs. Webster County, 130 N. W. 165, 167, 150 Iowa, 344."

Acting within the sound discretion vested in him by law, the Secretary of the Interior determined the necessity for irrigation and drainage canals and other structures necessary for Boise Project and constructed these with the funds appropriated by the Government, before fixing the construction charges by public notice. A list of the structures constituting the project and their cost, is found on pages 142 and 143 of the Twentieth Annual Report of the Reclamation Service for fiscal year 1920-1921, issued officially by the Secretary.

The construction charges include a general drain-

age system for the project as a whole as per the recital we have made from our contract "A." Said drainage system is specified as a construction charge and is described as follows:

"Drainage system:

Pioneer District		297,231.38
Nampa-Meridian District	1,750.98	303,357.26
Fargo Basin		37,771.48
From Deer Flat		31,796.98
Riverside District	58,236.50	249,596.53
Miscellaneous:		
Gibbons Drain		1,036.31
West End Drain		2,342.54
General Investigations and surveys		4,242.12
Total drainage system	58,987.48	927,374.60"

Every dollar of said expense was classified as a *construction charge of Boise Project.* The same was true of all drainage work until the instance now before the court. The drainage works of this project are also listed on page 47 of the Transcript.

In order to secure legal sanction for building drainage works as construction charges before the cost was fixed by notice, the suit of the United States vs. Ide was brought and finally determined in the Circuit Court of Appeals for the Eighth Circuit, reported in 277 Fed. 382, where the court said:

> "(7, 8.) It is well settled that plaintiff may construct drainage works *as a part of its irrigation system.* Bissett vs. Pioneer Irr. Dist., 21 Idaho 98, 120 Pac. 461; Pioneer Irr. Dist. vs. Stone, 23 Idaho 344, 138 Pac. 382; Nampa &

> Meridian Dist. vs. Petrie, 28 Idaho 227, 153 Pac. 425; G. G. Burt, et al., Drainage Dist. vs. Farmers Co-Operative Co., 30 Idaho 752, 168 Pac. 1078. *The necessity for drainage*, and the *method of conducting the work* are, in our opinion, in the sound discretion of the Secretary of the Interior, and such discretion cannot be reviewed by the Courts." (Italics are ours.)

This decision is significant on several points:

1. The drainage was constructed as a part of the irrigation system and not as operation charge therefor.

2. The Secretary determined the *necessity* for drainage and *methods* of *conducting the work* before public notice to be paid for with public moneys and included as construction cost in public notice.

3. The decision as to jurisdiction rests solely on Idaho cases and in every one of them the Idaho Supreme Court confirmed the drainage work as a *construction charge*. One of these cases construed the identical contract now before this Court.

It should be observed that the Secretary of the Interior is required by the Federal Statutes to proceed in conformity with State laws in carrying out the provisions of the Reclamation Act.

Section 8 of the Reclamation Act of June 17, 1902, reads as follows:

> "Sec. 8. That nothing in this act shall be construed as affecting or intended to affect or to in any way interfere with the laws of any

State or Territory relating to the control, appropriation, use, or distribution of water used in irrigation, or any vested right acquired thereunder, and the Secretary of the Interior, in carrying out the provisions of this act, shall proceed in conformity with such laws, and nothing herein shall in any way affect any right of any State or of the Federal Government or of any landowner, appropriator, or user of water in, to, or from any interstate stream or the waters thereof: Provided, that the right to the use of water acquired under the provisions of this act shall be appurtenant to the land irrigated, and beneficial use shall be the basis, the measure, and the limit of the right."

The provisions of the contract under consideration were exhaustively considered by the Idaho Supreme Court in two confirmation proceedings. The first of these, being the one cited in the Ida. Petrie case, 153 Pac. 425, related to the validity of the contract between the District and the Government. In that case the Court held that the cost of the water rights and of the drainage works must be assessed to the lands on the basis of benefits resulting therefrom under the statutes relating to construction charges. The contract was again before the Court on the confirmation of the assessment of benefits for the drainage charges and the Court cancelled the assessments for drainage charges when levied as operation and maintenance charges and required that they should be assessed as construction charges on basis of actual

benefits resulting from drainage. Considered in connection with the case before the Court this decision is directly in point upon two crucial principles, to-wit:

1. Under the Idaho law an irrigation district will not be permitted to collect for drainage construction as an operation or maintenance charge. It must be collected as a construction charge.

2. Under the Idaho law an irrigation district will not be permitted to collect the cost of drainage construction except on the basis of the actual benefits resulting to the land from drainage. In other words, this appellant can neither collect the drainage costs under consideration as an operation and maintenance charge nor can it be collected on the basis of drainage benefits since under the allegations of the complaint the lands in the District are not benefited at all by this particular drainage.

The decision is reported in 37 Idaho, page 45, 223 Pac. 531. On page 533 of the Pac. Rep. the Court said:

> "In Pioneer Dist. v. Stone, and Nampa & Meridian Dist. v. Petrie, this Court simply held that an irrigation district has the power to contract for the construction of a drainage system under the irrigation district law. There is nothing in the opinions to indicate that the district can charge the cost as an operating expense and make a flat assessment. On the contrary, in Nampa & Meridian Irr. Dist. v. Petrie, the

Court said: '(5) Where a contract is entered into between an irrigation district and the United States providing among other things, that arid lands within the jurisdiction of the irrigation district, in order to secure a full water right from a government project, shall be assessed not to exceed $75 per acre, such contract is subject to the laws of this state governing irrigation districts and to the apportionment of benefits thereunder, and the fixed charge to be assessed against the lands of any particular land owner within such irrigation district for such water right will be finally determined by the district court of the judicial district within which said irrigation district is located, as provided by sections 2400-2403, Rev. Codes.

" '(6) The same rule and the same procedure, as indicated in paragraph 5, is to be followed in the assessment of benefits with reference to the sale of partial water rights to supplement water rights already existing, and also with reference to the assessment of benefits incident to the construction of a drainage system within an irrigation district.' "

"The opinion makes it perfectly clear that the con-
"tract is subject to the laws governing irrigation dis-
"tricts in the assessment

"of benefits. 28 Idaho 237, 153 Pac. 428. The section of the statute governing the apportionment of benefits and assessment is C. S., Sec. 4362, which provides that the assessment must be made in accordance with the benefits which

will accrue to each of the tracts or subdivisions from the construction of the works."

On rehearing the Court said:

"On the original hearing respondent justified the flat assessment for drainage purposes on the theory that the expense of drainage was *part of the maintenance or operating cost.* This theory we could *not approve.* On rehearing respondent took the position that the assessments for drainage were based upon the benefits *accruing to the lands from irrigation.* In other words, if a tract of land derives a certain benefit from the water furnished by the district for its irrigation, it derives the same benefit from the drainage project built by the district for the drainage of the wet lands. It is apparent, as we said in the original opinion, that the assessments are not based on the *benefits derived from drainage.* With this new theory of respondent we are not in accord. *When the statute provides that land within an improvement district may be assessed for the cost of the improvement in accordance with benefits derived it means, benefits derived from the improvement. Where the assessment is for the drainage project, it must be based on benefits derived from it, and not on benefits derived from irrigation.*" (Italics are ours.)

It will be observed that under the foregoing decision appellant is powerless to collect the charge imposed by the Secretary. Also, although the Boise Project is a Government Project Sec. 8 of the Rec-

lamation Law requires that: "The Secretary of the Interior, in carrying out the provisions of this Act shall proceed in conformity with" state laws.

We claim therefore, that the decision of the Idaho Supreme Court in the Petrie case should be regarded as authority sufficient to justify this court in holding that the Secretary was in error in determining that drainage construction could be imposed in any way except as a construction charge and governed by Section 4. Also that he was in error when he attempted to impose said charge on a unit of the Project which is not benefited by the proposed works.

But if the court cannot so hold then we urge that said decision together with the classifications heretofore made by the Secretary under which drainage construction was determined to be a construction charge together with the fact that the proposed construction involves an expenditure of large sums of money and the proposed classification is absolutely without precedent indcate that the action of the Secretary is probably arbitrary and that appellant is entitled to the benefit of that part of the decision under consideration which reads as follows:

> "While indefinite, the term operating expense is a broad and comprehensive one and its meaning in a given case depends on the nature and amount of the expenditures, and all the surrounding circumstances. As said by the court in (fol. 130) Schmidt v. Louisville C. & L. Ry. C. 84 S. W. 314, 318: 'There is no rule of law declaring what constitutes operation expenses.

That is to be determined by the testimony as to each item of expenditure. It is a matter of evidence, and determinable like any other fact.'" (p. 57, Tr.)

Under said statement, we assert that we are entitled to have the case remanded and defendant required to answer and establish his claim upon competent testimony.

III.

POWER OF THE SECRETARY TO CONSERVE AND PROTECT THE PROPERTY UNDER HIS CHARGE

We quote from the opinion:

"The situation confronting the Reclamation Service was this: The necessity for drainage follows irrigation on an extensive scale almost as a matter of course. It cannot be determined in advance with any degree of certainty when drainage will be required, or its cost or extent when required. If not provided for in advance, as was the case here, it can only be provided for by agreement with a majority of the landowners affected, or by a maintenance and operation charge. The prosecution of the present suit gives little promise that the necessary consent could be obtained, but the *power* of the *Secretary to conserve* and *protect* the property under his charge is not dependent upon any such consent."

The facts assumed are contrary to the record. The proposed charge is for the construction of a drainage

system to relieve lands of seepage water. It is not to conserve and protect the property of the Government. Not a single structure, dam, ditch or reservoir placed by the Government on this project will be conserved and protected by this expense. The notice marked Exhibit "C," page 17 of Record, expressly admits that it is to be used "in providing drainage on the Boise Project to minimize or prevent as far as possible the swamping and waterlogging of the lower lying lands of the Project by seepage from the irrigation of the higher lands," etc. This much and no more is admitted by the Bill of Complaint. We think the Court can take judicial notice that the irrigation works and structures all necessarily lie higher than the lands irrigated therefrom and that the seeped lands lie lowest of all and a long distance usually from the property of the Government under the charge of the Secretary. It is the *reclamation* of lands lying under the Government works that is to be accomplished and nothing else. The status of the works by which the drainage is accomplished has long been established but never before has it been suggested that the work is justified to save and protect government property.

Arid lands are reclaimed by irrigation. Seeped lands are reclaimed by drainage. But both are included in the general term "Reclamation."

In case of U. S. vs. Ide, the sole question was the jurisdiction to construct drainage works of this

character. No one suggested or claimed that the jurisdiction was based on the inherent right and duty of the Secretary to conserve and protect government property. The court said it might be built as part of the irrigation system. That decision rested solely on Idaho cases in which drainage was treated as a major act of construction. The cited case of G. G. Burt et al Drainage District vs. Farmers Co-operative Co., 30 Idaho, 752, 168 Pac. 1078, held:

> "This court has held that an irrigation district may construct drainage works as a necessary *complement* of its irrigation system."

The "complement" is that which *completes*. It is not that which maintains, conserves or preserves. The need for drainage is caused by irrigation. Any irrigation system which makes no provision for drainage is incomplete until such works are constructed as may become necessary. The Secretary has judgment and discretion in fixing the amount and determining the necessity as long as he is using public funds which will be returned in the construction charge. Later, he is governed by Sec. 4 of the Reclamation Extension Act. But the works provided *before* and *after* public notice are of precisely the same status. They cannot be denominated "drainage" before and "conservation and protection" afterwards.

The Supreme Court of California dealt with this matter in following cases:

In case of Laguna Drainage District vs. Charles Martin Co., (California) 77 Pac. 935, the Court was discussing the constitutionality of a drainage district law. The Court said:

> "Both acts, too, provide for the reclamation (because the term 'drainage of land' has practically the same application as 'reclamation'; the one is the means employed, the other result) of bodies of land susceptible of one mode of reclamation."

And in case of Madera Irrigation District case, 92 Cal. 323, 28 Pac. 278, the Court said:

> "Whether the reclamation of the land be from excessive moisture to a condition suitable for cultivation, or from excessive aridity to the same condition, the right of the legislature to authorize such legislation must be upheld upon the same principle, namely, the welfare of the public, and particularly that portion of the public within the district affected by the means adapted for such reclamation."

But the Court implies that if the Secretary is required to secure the consent of a majority of the landowners something terrible may result. This conclusion or implication is contrary to the admitted facts as to reason.

In Section 14 of our Complaint (p. 4, Tr.) we allege:

> "That immediately upon the entry of said decree, the water users from Boise Project represented by the said Payette-Boise Water Users' Association, being the landowners of the Project outside of Complainant District, individually entered into the certain contract provided for in said decree and appearing therein as Exhibit 'A' of said stipulation, and thereby contracted and agreed that the Secretary of the Interior might build the said drainage works referred to in Par. 10 hereof and that the landowner would pay the charges (fol. 15) therefor provided in said contract."

It is therefore admitted that the members of the Water Users' Association representing 100,000 acres of the Project, being the part in which the drainage is to be constructed, have expressly contracted to pay this charge.

But suppose they had refused. All that they have is invested in this land. Surely they are presumed to have sense enough to consent to drainage if it is needed and the plan is satisfactory and the cost is not destructive. It is their land that is being destroyed. It is their money which will be spent. Otherwise, a visionary or impractical engineer, without a dollar at stake in the project, might impose the charge under mistake of judgment and ruin the community. If the law is defective, the mistake has been made by Congress and can only be corrected by it.

IV.

CAN THE CHARGE BE JUSTIFIED AS OPERATION CHARGE TO PREVENT INJURY FOR WHICH DAMAGES MAY BE RECOVERED?

In the decision under consideration the Court held:

> "It has been almost universally held that damages to person or property resulting from operation is a proper operating expense, and had injury resulted to crops or other property from the operation of this system, compensation for such injury would fall within the most restricted meaning of that term. Furthermore, the power of the Secretary does not stop at reparation for past injuries. It extends to the prevention of future injuries as well, and if, in the exercise of the broad discretion vested in him, the Secretary deems it advisable to incur expense to prevent future losses rather than make reparation after the losses have been incurred, a court of equity will (fol. 131) not review his discretion." (P. 58, Tr.)

It will be conceded that public utilities are liable for damages to person or property resulting from the negligence of the management and that the amounts paid out for such damages may be charged as operating expenses. But no court has ever held in favor of such liability where the damage is caused by seepage from the operation of irrigation canals or the irrigation of lands unless there was negligence in the construction or operation of the ditch or use

of the water. It is not pretended that the seepage under consideration results from such cause. In the arid regions the owners of the higher lying lands as well as those whose lands are subject to seepage resulting from irrigation, have a constitutional right to divert water by means of canals constructed according to the engineering practices of the community as well as to irrigate lands therefrom in the manner commonly practiced and without negligence. The seepage which unavoidably results from carrying water from ditches made of earth and gravel and from the deep percolation of water in the sub-soil resulting from irrigation is classed as *damnum absque injuria*. Any other theory of the law would almost nullify efforts to reclaim land by irrigation. In case of Nampa & Meridian Irrigation District v. Petrie, 37 Idaho 45, 223 Pac. 531, the Idaho Supreme Court, in criticizing a contention of this character, said:

> "If it means that an irrigation district is absolutely liable for injury caused by seepage water in the absence of negligence on its part, it is squarely in conflict with the rule long established in this and the other arid and semi-arid states, that one who conducts irrigation water through a ditch, or uses it on his land, is not liable for injury caused by seepage unless he is negligent in the construction or operation of the ditch, or the use of the water. McCarty v. Boise City Canal Co., 2 Idaho (Hasb) 245, 10 Pac. 623; Arave v. Idaho Canal Co., 5 Idaho 68,

46 Pac. 1024; Stuart v. Noble Ditch Co., 9 Idaho 765, 76 Pac. 255; Verheyen v. Dewey, 27 Idaho 1, 146 Pac. 1116; Burt v. Farmers' Co-Operative Irr. Co., 30 Idaho 752, 168 Pac. 1078. There is no proof and no contention that the district was negligent."

In case of Campbell v. B. R. & A. W. & M. Company, 35 Cal. 683, the Court said:

"The defendant was bound to the use of such care in the management of the ditch as prudent persons employ in the conduct of their own affairs." (Citing cases.)

In Fleming v. Lockwood, (Mont.) 92 Pac. 962, the syllabus reads:

"The owner of an irrigation ditch, seepage of water from which, not intentionally caused, injures the property of another, is liable for the injury only in case of negligence." (Citing cases.)

We challenge counsel for respondent to cite a single decision of any court in support of the decision of the Circuit Court of Appeals on this point.

V.

We charge that the public notice attempts to fix a flat rate per acre in violation of said Section 5, which requires that the operation and maintenance charge shall be—

"based upon the total cost of operation and maintenance of the project, or each separate

unit thereof, and such charge shall be for each acre-foot of water delivered."

The public notice states—

"Announcement is hereby made that the annual operation and maintenance charge for the irrigation season 1921 and until further notice against all lands of the Boise Project under public notice (except 1800 acres in State of Oregon) shall be divided into two parts:

"(a) A regular operation and maintenance charge to be hereafter announced in the usual manner to cover all costs of operation and maintenance other than drainage.

"(b) A special operation and maintenance charge for drainage purposes of One Dollar per irrigable acre per year until further notice * * * said drainage charge to be considered a part of the minimum operation and maintenance charge per irrigable acre, the remainder of said minimum charge per acre and all charges per acre-foot of water used in excess of the amounts of water allowed for such minimum charge to *be hereafter announced and determined by public notices to be hereafter issued from time to time.*" (Tr. pp. 17-18.)

This is a continuing notice of a drainage charge of $1.00 per year per acre without regard to the amount of water used, or the total cost of the operation for the current year. The terms of the law positively preclude the possibility of a lawful maintenance and operation charge, except for yearly

periods and upon the basis of a pro rating of the charge to the landowner on the basis of the amount of water he has actually used.

This charge can only be announced at the close of the irrigation season, upon an actual determination of the total cost for the year and the amount of water used during the irrigation season, by each landowner. *The law guarantees to the economical user of water a decreased charge as an incentive to economy in use. This notice strikes down that guaranty.*

The latter part of the announcement is not authorized by law and is meaningless. The announcement of the drainage charge merely constitutes an arbitrary demand for money. If the Secretary can demand $1.00 per acre in this way, he can demand $10 just as well. If we cannot contest this charge this year we cannot do so next year, or another year. The charge can be repeated just as often as the Secretary desires. The charge is dated in February, 1921. This action was not brought until April, 1922. If said notice could have been supplemented so as to make it legal, if that is possible, long prior to this suit an additional announcement could have been made and the defendant could have justified the charge by proper answer. This he has not done. As was stated in the case of the United States v. George, *supra:*

> "This Court rejected the contention and decided that the regulation transcended the power of the Secretary. We said: 'If Rule 7 (the regu-

> lation involved) is valid, the Secretary of the Interior has power to abridge or enlarge the statute at will. If he can define one term, he can another. If he can abridge, he can enlarge. Such power is not regulation; it is legislation.'
>
> "In that case the power of the Secretary of the Interior was directly associated with the right conferred. Yet it was held that such power could not qualify or limit the right. In other words, a distinction between the legislative and administrative function was recognized and enforced. And, similarly, this distinction must be recognized and enforced in the case at bar. The distinction is fundamental."

We respectfully submit that the case at bar directly involves a distinction between the legislative and administrative function and we are entitled to have this distinction recognized and enforced. We insist that the Secretary must obey the positive requirements of the statute and base the charge upon the amount of water actually used and the total cost of the project for the current year. The record further shows that while the Secretary is seeking to enforce this charge of $1.00 per acre against appellant as only a part of the drainage charge for the year 1921, yet only about four months later, and on July 12, 1921, the Secretary entered into a binding agreement with the Water Users' Association for a flat rate of $1.00 per acre *in full payment* of the drainage charge for 1921. This applied to all of the

lands of the project outside this District, aggregating 100,000 acres. (Tr. Sec. 10, p. 22.)

Said contract provides a lower charge for the lands outside than those in this district. In other words, the record shows that the Secretary is attempting to enforce a discriminating charge against appellant, which is neither based on the amount of water used as required by Section 5, nor is it the amount charged to the rest of the lands of the project or any of them, nor is it based on the total cost of the Project.

VI.

THE DISTRICT AS A UNIT OF THE PROJECT

Section 5 of the Reclamation Extension Act provides that the landowner shall pay—

> "an operation and maintenance charge based upon the total cost of operation and maintenance of the project, *or each separate unit thereof*," etc.

What is the legal significance of the words, "or each separate unit thereof"?

Said Section 5 also provides:

> "That whenever any legally organized water users' association or irrigation district shall so request, the Secretary of the Interior is hereby authorized in his discretion, to transfer to such water users' association or irrigation district, the care, operation and maintenance of all or any part of the project works, subject to such rules and regulations as he may prescribe."

The Secretary contracted with this appellant under said statute. It is a public corporation with jurisdiction to drain the project lands within its boundaries. The record discloses the reasons for the contract. Among other things, the Director of the Reclamation Service said on page 49 of the transcript:

> "Explanatory Statement:
>
> "Unless irrigation districts or some form of organization capable of binding all the lands should be formed, it will be necessary to depend upon individual applications or contracts, the making of which is largely optional with the individual landowners. Without district organizations binding all lands, it is estimated that a considerable percentage of the landowners will avoid paying the Government for a water right by picking up waste water, or securing water in some way or holding the land for speculation without irrigation."

Having created this unit, must it not affirmatively appear from evidence or admissions that the proposed drainage will benefit the lands of this unit before they can be charged with that expense? Sections 4 and 5 of the Statute both recognize this principle. Section 4 provides that the increased cost must be charged to the lands affected, and Section 5 provides that the cost must be determined according to the unit.

Appellant has alleged that the drainage under consideration is entirely outside the District and pay-

ment has been refused on the grounds that the drainage will not benefit the lands of the District.

For the foregoing reasons, Appellant prays the decision be reversed.

Respectfully submitted,

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